No. 84-1302

In the Supreme Court of the United States

OCTOBER TERM, 1984

Office Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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SHELL OIL COMPANY,
Petitioner,

vs.

THE PINEY WOODS COUNTRY LIFE SCHOOL, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

[Jurisdictional and Procedural Questions]

I. Whether 28 U.S.C. § 1291 and Federal Rule of Civil Procedure 54(b) permit (A) appellate consideration ("affirmance") of a significant state law question encompassed within a *nonfinal noncertified* claim, and (B) appellate reliance upon such "affirmance" to decide a significant state law question never reached by the district court.

[Policy Question of General Law]

II. Whether, under the circumstance of a prudent contract provision for processing raw gas by the lessee-seller for the benefit of lessee and lessor alike, it is impossible as a matter of general law for a good-faith sale of raw gas to take place at the well.

PARTIES TO THE PROCEEDING

Petitioner

Shell Oil Company

Respondents

The Named Plaintiffs

The Piney Woods Country Life School
Ridgway Management, Inc.
D'Lo Royalties, Inc.
Thomas L. Spengler
Albert L. Fairley, Jr.
James V. Fairley

The Plaintiff Class Members

The members of the respondent class are set forth in footnote one below.[1]

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1. Mrs. Henry V. Bailey, A.C. Barton, Roddie C. Berry, Gussie Mae Berry, Black Warrior Minerals, Inc., R.T. Boteler, H.J. Boyd, Lee Dora Burch, Jack F. Burke, Ralph C. Butler, Agnes Chapman Butler, Colaro Corporation, W.R. Fairchild Const. Co. Ltd. in care of the Merchants National Bank of Mobile, Wiley Fairchild, Dorothy H. Gillespie, Georgia L. Jenkins Glissom, Mrs. Zoe P. Hall, Hattiesburg American Publishing Co., Hayes Petroleum, Inc., H.A. Hedbert, Mrs. Noreen Hogg, Ann Hough Hopkins, Don F. Hugus, Jr., George D. Hunt, Mary C. Jenkins, Velma R. Jenkins, Lawson Johnson, Louis Johnson, Louise Johnson, Mary Johnson, James E. King, Jr., Lignum Oil Co., W. Baldwin Lloyd, Mary C. Lynn, Deposit Guaranty National Bank, Assignee of A.W. Magruder, Jr., M.H. Marr, E.B. McGehee, H.C. McGehee, Rev. Julius A. McRaney, Kenneth Allen McRaney, Merchants National Bank of Mobile, Assignee of Lester Meng, Jr., Betty D. Mortimer, Glenn D. Mortimer, Jr., Aline F. Neal, Walter R. Neill, Deposit Guaranty National Bank, Assignee of John D. Noble, Pachuta Corp., Edith Perkins Patton, First National Bank of Jackson, Trustee under the Kathryn Susan Parsons Perez Trust, Peoples National Bank of Tyler, Texas, Trustee (Pirtle Trust), Dr. David L. Perkins, T.S. Price, L.P. Rush, Citizens Bank of Hattiesburg, Trustee of the L.P. & Eunice H. Rush Trust, Carolyn H. Ryan, Katherine Westbrook Ryan, Thad J. Ryan, Thad J. Ryan, Jr., Sabine Royalty Corp., Ralph V. St. Johns, R.H. Sims, Guy W. Smith, G.G. Stanford, Sun Oil Co., F.M. Tatum, Will S. Tatum, Joe A. Thompson, Robert L. Thomsen, Mrs. Jessie Neal Vaughan, Caroline Neal Vaughan, E.H. Wilkins, and Watson H. Wise.

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1984

SHELL OIL COMPANY,
Petitioner,

vs.

THE PINEY WOODS COUNTRY LIFE SCHOOL, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Shell Oil Company ("Shell") prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit entered on a Rule 54(b) appeal on March 8, 1984, reversing a question of general law certified for appeal and, further, notwithstanding jurisdictional and procedural restraints, deciding unsettled state law questions not decided at the trial level and not susceptible to certification.

OPINION BELOW

The district court opinion is reported at 539 F.Supp. 957; the Fifth Circuit opinion is reported at 726 F.2d 225; and both opinions are appended. (App. A & B)

JURISDICTION

The Fifth Circuit entered its decision on March 8, 1984, and denied rehearing on November 15, 1984. (App. B & B-1) Jurisdiction is based upon 28 U.S.C. § 1254(1).

STATUTES INVOLVED

28 U.S.C. § 1291:

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

Federal Rule of Civil Procedure 54(b):

(b) *Judgment Upon Multiple Claims or Involving Multiple Parties.* When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

STATEMENT OF THE CASE

A class of royalty owners with interests in three Mississippi deep sour gas fields, dissatisfied with gas royalty based on actual sale proceeds received by Shell under a prudent contract of sale, brought this diversity action for additional royalty based on *current* market value. This claim presented a question of considerable import not settled in Mississippi and subject to conflicting rulings in other jurisdictions; however, the market value question would never be reached unless the gas had been sold by Shell other than at the well.[2] The class action complaint raised other questions which are not a subject of this petition.[3]

District Court Rulings

Gas Sold. Where the gas was sold determined whether the "amount realized" or "market value" royalty standard applied. The district court resolved this threshold question on the merits and found the raw gas to have been sold "at the well" and thus applied the "amount realized" royalty standard. Having so adjudicated the point of

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2. The pertinent lease provision: "[the royalty to be paid on gas] sold or used off the premises [shall be] the market value at the well of one-eighth of the gas so sold or used, provided that on *gas sold at the wells* the royalty shall be one-eighth of the *amount realized* from such sale." (emphasis added)

3. The royalty owners also pursued damages for alleged violations of sections one and two of the Sherman Act. In addition to diversity jurisdiction under 28 U.S.C. § 1332, jurisdiction thereby vested in the district court pursuant to 15 U.S.C. § 4 and 28 U.S.C. §§ 1331 and 1337. The royalty owners ultimately abandoned, however, the portion of the complaint asserting violation of the Sherman Act. (App. A at A10; App. B at A85 n. 4) Moreover, they failed on the merits in an attack upon the costs of transporting and processing the gas being shared by royalty owners and working interest owners (App. A at A38-A39), and the court of appeals agreed. (App. B at A110)

sale, the district court was not required to and never reached, in the context of gas sold, the subsidiary questions of what "market value" means or how you prove it. (App. A at A48)

Gas Used. A small quantity of gas was not sold but rather was used by Shell for off-lease rig fuel. For this gas, producing no sales proceeds, the district court recognized and discussed a royalty standard based on "current market value rather than the contract price." (App. A at A57) The district court, however, rejected the royalty owners' proof of current market value and called for further proof. (App. A at A71) The royalty owners declined to offer further proof, choosing instead to pursue an immediate appeal of the district court's point of sale finding.

Rule 54(b) Certification

Acknowledging the impediments imposed by 28 U.S.C. § 1291, the class sought certification under Rule 54(b). (App. C) Shell opposed certification, contending that even if multiple claims technically existed, the strong interrelationship between claims precluded the use of Rule 54(b). (App. D) Market value, in the context of gas *used*, had been discussed by the trial court but with no decision; in the context of gas *sold*, the potential question of market value had not been reached by the trial court and, consequently, not discussed. Nevertheless, the district court granted certification over Shell's objection (App. E) and entered judgment with respect to all claims except market value on gas *used*. (App. F) The district court judgment expressly deferred determination of additional royalty due, if any, on gas *used*. ***No judgment was entered upon the claim for gas used for off-lease rig fuel.***

The royalty owners persuaded the district court that separate and independent multiple claims truly existed, *i.e.* that appellate review should be obtained with respect to the place at which the gas was sold and the appropriate division of costs of transportation and processing. But once an appeal was certified the royalty owners urged not only (1) reversal of the district court's point of sale finding and (2) reversal of the district court's finding on transportation and processing costs, but also (3) carte blanche application to gas *sold* of the district court market value discussion addressing gas *used* and (4) reversal of the district court's rejection of their proof on the market value of gas *used*. Therefore, on appeal the royalty owners merged the *nonfinal* claim (gas *used*) with the purportedly distinct *final* claim (gas *sold*) to demand current market value on all gas as they allegedly proved it.

Appeal Court Decision

On the merits, the court of appeals proceeded to decide the whole controversy;[4] the court addressed all "issues" except the dollar amount of damages. Discarding sales law principles in making the threshold determination of *where* the gas was sold, the Fifth Circuit reversed the district court's point of sale finding. The appeal panel held a lessee-seller cannot under any circumstances sell gas to be processed by it "at the well." (App. B at A89)

The court of appeals then reached the issue of what "market value" means in the context of gas sold, an unsettled question of state law not passed on by the district

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4. Shell moved the Fifth Circuit for a ruling on jurisdiction and to dismiss the appeal or, alternatively, to limit issues on appeal. (App. G) The motion was carried with the case and denied in the opinion. (App. B at A85-A86)

court. Merging district court consideration of the nonfinal claim (gas *used*) with its resolution of the purportedly final claim (gas *sold*), the court of appeals *"affirmed"* the district court's discussion of the meaning of market value in the context of gas *used*. (App. B at A93, A104) Moreover, the court of appeals predicated "affirmance" of the district court's market value discussion upon an adverse inference drawn from Shell's failure to appeal this *nonfinal noncertified* claim, and then the court applied this "affirmance" to its reversal on point of sale. (App. B at A92-A93, A113) Finally, the court of appeals addressed the very question left in the district court awaiting further proof, *i.e.* the mode and method of market value proof for gas *used*, and held that the district court was in error in its nonfinal rejection of the royalty owners' expert testimony. (App. B at A104-A108)

The Fifth Circuit remanded the case for the determination of damages. (App. B at A113) Even though the claim for additional royalty on gas *used* has never been decided or finalized at the trial level, Shell's right to appeal any adverse district court findings on this claim has been foreclosed.

REASONS FOR GRANTING THE WRIT

This petition revolves around the deeply rooted jurisdictional principle of finality of judgments. More particularly, the court of appeals misconceived or ignored the effect of district court certification under Federal Rule of Civil Procedure 54(b). An erroneous assumption of jurisdiction resulted, and a dangerous appellate precedent has been established. Rule 54(b) has become a vehicle for appellate court resolution of all questions addressed by a district court, regardless of whether such

questions are included within a nonfinal claim. The certainty in multiple claims disputes sought by Rule 54(b) has been severely jeopardized. Moreover, the Rule 54(b) confusion has produced a fundamentally inconsistent decision which totally misapprehends the mineral lessor-lessee relationship.

Thus, the assumption of jurisdiction by this Court is necessary to preserve the statutory requisite of finality, uniformity in utilization of Rule 54(b), the mineral lessee's contractual freedom to market production and consistency in application of controlling legal principles within a single juridical decision.

I. *The Fifth Circuit's affirmance of the district court's nonfinal market value "holding" conflicts with applicable decisions of this Court.*

Congress has granted the courts of appeals "jurisdiction of appeals from all final decisions of the district courts of the United States." 28 U.S.C. § 1291 (1982). Since it is only Congress, and not the courts themselves, that may define the jurisdiction of the lower federal courts, federal appellate procedure has historically imposed finality as a condition for review. *Sears, Roebuck & Co. v. Mackey,* 351 U.S. 427, 433 n. 5 (1956); *Cobbledick v. United States,* 309 U.S. 323, 324 (1940). More particularly, this Court deems "the final judgment rule [to be] the *dominant* rule in federal appellate practice." *Flanagan v. United States,* 52 U.S.L.W. 4201, 4204 (U.S. Feb. 21, 1984) (emphasis added). The decision below, however, flies directly into the teeth of this Court's primal objective of fidelity to jurisdictional constraints.

The district court plainly stated that it was the court's conclusions that market value royalty was due on gas

used that "called upon" it to define market value. The district court then proceeded to define market value as current market value but never finally resolved the claim through ascertainment of damages. It certified as final its finding that the gas was sold at the well, but the district court just as clearly retained the claim for market value on gas used for further *district court* evaluation and *final* determination of how market value is to be ascertained.

The Fifth Circuit erroneously presumed, however, district court intent or, in any event, *power* to refer all "issues" to the court of appeals to supposedly assure the necessity of only one additional hearing. Moreover, it improperly utilized Shell's contention in its motion to dismiss to further justify reaching district court treatment of a nonfinal claim. Note the court of appeals' findings on the meaning of market value: "we *affirm* the district court's holding"; "we fully agree with the district court's conclusions"; "the basis of royalty should be 'market value at the well' at the time of production and delivery, *as the district court held*"; "we also find the district court's decision supported on other grounds"; "accordingly, we *affirm* the district court's holding that market value means current market value at the time of production." (App. B at A93, A95-A97, A104)

Furthermore, despite its own recognition that "the district court did not certify this issue for appeal," the Fifth Circuit scrutinized the district court discussion on proof of market value in response to an undeniably improper royalty owner appeal of district court rejection of their proof. The court of appeals issued an advisory ruling to the district court with detailed directions on how to finalize an unfinished and uncertified claim.

The court of appeals simply drew no jurisdictional lines; instead, the panel merged and treated as inseparably intertwined the certified claim and the uncertified nonfinal claim. Espousing self-perceived notions of "sound judicial administration," the court of appeals affirmed the very claim (gas used) retained by the district court and not finally decided. Yet, no jurisdictional predicate for affirmance existed. Principles of finality have been thrown to the wind, and Rule 54(b) has been incredibly extended to every "matter" upon which a district court has merely spoken.

Unquestionably, this Court strictly adheres to the Congressional mandate of finality. Finality contemplates the ultimate disposition of a cognizable claim for relief. *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 7 (1980). Where no adjudication of relief to be awarded has occurred, any district court finding of liability is clearly interlocutory, not final, and not appealable. *See Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737, 742-46 (1976). The finality requirement being jurisdictional in nature, an appellate court simply cannot consider the merits of a nonfinal claim. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981).

Rule 54(b) may have modified the single judicial unit theory of appellate review, but the § 1291 concept of finality remains unimpaired. *Cold Metal Process Co. v. United Engineering and Foundry Co.*, 351 U.S. 445, 453 (1956); *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 434 (1956). "The district court [and the court of appeals] *cannot*, in the exercise of [their] discretion, treat as 'final' that which is not 'final' within the meaning of § 1291." *Sears*, 351 U.S. at 437 (emphasis by the Court). Rule 54(b) "*scrupulously* recognizes the statutory requirement

of a 'final decision' under § 1291 as a *basic* requirement for an appeal." *Id.* at 438 (emphasis added).

The district court's market value discussion was plainly neither a "decision upon a cognizable claim for relief" nor " 'final' in the sense that it is 'an ultimate disposition of an individual claim.' " *Curtiss-Wright Corp.*, 446 U.S. at 7. Shell had no right to appeal such market value "holdings," but the royalty owners likewise had absolutely no right to seek either carte blanche application of district court discussion of the meaning of market value or appellate review of its rejection of their proof. The definition of market value cannot be divorced from the accompanying means of determination. Rule 54(b) and § 1291 preclude appellate review of district court proclivities as to subsidiary questions enmeshed in unresolved substantive claims.

The court of appeals, under the guise of Rule 54(b), has exceeded its jurisdiction without proper regard for and directly contrary to the plain teachings of this Court. The court purportedly relied upon *Curtiss-Wright* in assuming jurisdiction at the outset, but from that point forward the assumption knew no bounds. Finality may at times be difficult to define, but the district court's failure here to determine damages on gas used clearly portrays the absence of finality. The Fifth Circuit has expelled all substance from the prerequisite of finality. It has rendered the Rule 54(b) threshold distinction between the final and nonfinal claim meaningless.

Consequently, certiorari should be granted to preserve the sanctity of the final judgment rule as applied on a Rule 54(b) appeal.

II. *The Fifth Circuit's erroneous application of Rule 54(b) so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.*

The prime responsibility for the proper functioning of the federal judiciary rests upon this Court. The decisions cited above evidence the Court's frequent grant of certiorari to ensure that the jurisdictional prerequisite of finality is preserved. Moreover, the Court may be similarly compelled to grant certiorari to consider an "important problem under the Federal Rules of Civil Procedure"; *Hickman v. Taylor*, 329 U.S. 495, 498 (1948); and the necessity of certiorari is particularly strong where, as here, the decision below threatens "the goal of uniformity of federal procedure." *Hanna v. Plumer*, 380 U.S. 460, 463 (1965). *Curtiss-Wright* itself reflects the grant of certiorari "in order to examine the use of [the Rule 54(b)] procedural device." *Curtiss-Wright*, 446 U.S. at 3.

The court of appeals' decision dramatically departs from the traditional, well-defined finality guidelines which govern appeals; the manner and utilization of the affirmance of the district court's nonfinal discussion is peculiarly egregious. In improperly reaching the meaning of market value question, the Fifth Circuit first noted Shell's failure to appeal the district court's market value findings. The court of appeals emphasized that Shell not only failed to challenge the district court's application of a market value standard to gas *used* but also failed to appeal the district court's definition of market value. The Fifth Circuit then injudiciously concluded that Shell, having so conceded the district court reasoning to be correct, urged two different meanings for the words "market value" as employed in the same sentence. From this point, the court of appeals,

armed with the purported Shell concession and resultant irreconcilable contention, proceeded to affirm the district court and misapply this holding to all gas.

Yet, the district court's final resolution of "claims" ended at page 977 of its opinion. (App. A at A49) At that point, every final decision favored Shell; there was no adverse finding with respect to a final claim. Shell simply had nothing from which to appeal. Thus, the Fifth Circuit had neither the power nor the discretion to penalize Shell for failure to appeal a nonfinal discussion.

What has occurred here is Rule 54(b) confusion to the extreme which is antagonistic to the ends of justice. Section 1291 is not some technical rule in a game. *Sears*, 351 U.S. at 441 (Frankfurter, J. concurring). To the contrary, it is intended to assure and is indeed crucial to the efficient administration of justice. *Flanagan*, 52 U.S.L.W. at 4202. "The final judgment rule . . . preserve[s] the respect due trial judges by minimizing appellate-court interference with the numerous decisions they must make in the pre-judgment stages of litigation." *Id.* Rule 54(b), a strict adherent to the final judgment rule, is likewise designed to facilitate "sound judicial administration." *Curtiss-Wright*, 446 U.S. at 7-8.

Shell relied on these established fundamental principles. It respected the district court's retention of the nonfinal claim on gas *used*. Rather than play the royalty owners' self-serving game of finality, Shell opposed certification and subsequently filed a motion to dismiss the appeal. Its warnings, however, went unheeded. Rule 54(b) became a trap for the diligent litigant, and Shell, although fearful throughout, got caught.

Most importantly for purposes of this petition, the Fifth Circuit has redefined finality and severely eroded,

if not destroyed, the distinction between the final and nonfinal claim. *Absent intervention by this Court, Rule 54(b) litigants from this point forward, at least in the Fifth Circuit, must appeal all district court inclinations included within a nonfinal opinion on the merits.* The Fifth Circuit rule requires appeal of any district court resolution of a question included within a nonfinal claim. Otherwise, the litigant runs the risk of waiver of right to appeal, an adverse inference on related final claims, and the harsh consequences of the district court's adverse finding controlling appellate resolution of the final claims.

III. *The Fifth Circuit has postulated an unprecedented finding which results in a fundamentally inconsistent decision requiring this Court's intervention.*

The court of appeals' jurisdictional excesses are not without substantive consequences. Although not the direct subject of this petition, Shell opposed certification through the court of appeals in the belief that the legal principles governing resolution of the final and nonfinal claims were so intertwined that piecemeal review would lead to confusion and perhaps inequity on successive appeals. The Fifth Circuit's unanticipated total usurpation of jurisdiction forecloses any successive appeals, but the promulgation of an illogical rule of general law is an additional intolerable result.

Admittedly, this Court sits to review judgments, not opinions, and the judgment directing payment of current market value royalty evokes primarily state law principles recognized in some jurisdictions. Nevertheless, as the final arbiter in our judicial system, this Court should intervene where a court of appeals, reversing the district court, devises a threshold *Erie* finding totally devoid of judicial

support anywhere. Moreover, intervention is particularly appropriate where, as here, incorporation of the unprecedented finding through jurisdictional abuse produces a fundamentally inconsistent decision.

The court of appeals postulated as a matter of general law that gas to be processed by a lessee-seller cannot be sold "at the well." In so finding, the Fifth Circuit independently construed and unilaterally determined the "purpose" of the gas royalty clause. There being no indication of reversal of uncontroverted district court factual findings, the court of appeals apparently conceded that Shell exercised in good faith a prudent marketing alternative to legitimately achieve a gas sale free from state regulation. The court concluded, however, that despite the patent emphasis upon *point of sale*, the lease focused not upon where the gas was sold but rather upon what kind of gas was sold. Selectively choosing commentator excerpts but without reliance upon a single court anywhere, the appeals panel then decreed a wellhead sale to be impossible.

Like the district court, all judicial decisions recognize the lessee-marketer's right in good faith to establish the point of sale. *E.g.*, *Barby v. Cabot Corp.*, 465 F.2d 11 (10th Cir. 1972); *Kretni Development Co. v. Consolidated Oil Corp.*, 74 F.2d 497 (10th Cir. 1934); *Waechter v. Amoco Production Co.*, 537 P.2d 228 (Kan. 1975); *Exxon v. Middleton*, 613 S.W.2d 240 (Tex. 1981). There is simply no basis for judicial disregard of the point of sale legitimately established by the lessee-seller and gas purchaser. The very presence of the "amount realized" standard evidences the royalty owners' willingness to receive royalty in accordance with a prudent sale consummated by Shell in good faith.

As previously stated, the request for certiorari to review the point of sale finding is not predicated only upon

the erroneousness of this holding. The miscarriage of justice results not just from the bald statement absolutely precluding the wellhead sale of processed gas but also from the manifest judicial inconsistency which followed. The perceived "purpose" in including both "amount realized" and "market value" within one royalty provision, not sales law principles, controlled the court of appeals' resolution of the point of sale issue; but the court of appeals bottomed its "current market value" finding not upon this "purpose" but upon the very sales law principles rejected when addressing point of sale.

In the first place, the court of appeals abused its discretion in even reaching this issue never reached by the district court. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). The district court at least understood that the law of sales controlled either both the point of sale and meaning of market value issues or neither. The very same lease language is in issue; the very same gas is being sold; and the rights of the very same lessors and Shell are at stake. If a court of appeals is going to create substantive state law as to which (a) there is no illuminating state precedent, (b) there is a distinct policy choice as to the legal principle to be applied, and (c) there is substantial disagreement among the jurisdictions concerning which legal principle is to be applied, the court of appeals must at the very least consistently apply the legal principle chosen.

The court of appeals' pronouncement here of a novel absolute is truly extraordinary. Gas leases are "construed to include a duty diligently to develop and market." *California v. Southland Royalty Co.*, 436 U.S. 519, 528 (1978). Shell incurred pioneer risks in drilling for sour gas at great depths coupled with unprecedented pressures. Its marketing alternatives were: *either* to sell the raw

stream to a third party who in turn would process it to secure methane and recover elemental sulphur, in which event the court of appeals would sanction the wellhead sale; or to sell the raw stream at the well, reserving for the benefit of lessee and lessors alike the right to process and retain the valuable sulphur,[5] in which event the court of appeals dictates a wellhead sale to be impossible. There is no fact in the record or judicial precedent to support such a marketing anomaly.

The district court scrutinized the overwhelming evidence and judiciously concluded in the absence of clear legal precedent that because the sales contracts embodied the true intentions of the lessee-seller and gas purchaser, the contractual point of sale likewise prevailed under the gas royalty provision. Only then did the district court attach significance to the executory character of a gas sales contract. Supposedly predicating all findings on the meaning of the royalty clause, an overzealous court of appeals has utilized, however, a self-created infirm proposition of law to hypothecate a nonexistent lessor. It is absolutely inconceivable that the same lessor simultaneously contemplated widely varying royalty standards solely dependent upon whether his lessee-seller, in an attempt to enhance the value of production for lessor and lessee alike, processed or transported the gas. The court of appeals has converted the "happenstance" of processing into a pendulum upon which swings enormous sums of money never remotely contemplated by the parties.

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5. The monetary difference here has proven to be enormous. With first deliveries in 1972, Shell received and disbursed to royalty owners on approximately $13.00 per long ton of sulphur sold; at the time of trial in 1979 Shell was receiving and disbursing on approximately $54.00 per long ton; and today Shell is receiving and disbursing on approximately $104.00 per long ton.

The continued development of the Nation's energy resources is undeniably a matter of tremendous public importance. Shell's underlying argument on the merits does not seek relief from an imprudent lease or gas sales contract, but rather a judicious determination of a mineral lessee's rights (duties) to market gas production in a highly regulated, competitive environment. Certiorari should be granted to review the court of appeals' erroneous point of sale finding to preserve the mineral lessee's freedom to make legitimate sales unrestrained by federal appellate court impossibility and to assure consistency, and accordingly basic principles of substantial justice, in the appellate resolution of interdependent controlling legal principles.

CONCLUSION

The central purpose of the Federal Rules of Civil Procedure, including Rule 54(b), is to promote justice to litigants. The court of appeals' decision not only fails to promote but substantially impedes accomplishment of this objective. The court of appeals has disregarded basic jurisdictional and procedural restraints. It has created substantive law wholly without factual or legal precedent which destroys legitimate marketing alternatives available to a gas lessee. Certiorari should be granted to assure adherence to and uniformity in the application of fundamental precepts governing federal appellate practice.

Respectfully submitted,

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